

AMENDED IN ASSEMBLY JULY 11, 2011

AMENDED IN ASSEMBLY JUNE 14, 2011

AMENDED IN SENATE MAY 31, 2011

AMENDED IN SENATE MAY 3, 2011

AMENDED IN SENATE APRIL 25, 2011

AMENDED IN SENATE MARCH 21, 2011

## SENATE BILL

**No. 364**

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### Introduced by Senator Yee

(Coauthor: Assembly Member Huffman)

February 15, 2011

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An act to add ~~Sections 6372 and~~ *Section* 19137 to the Revenue and Taxation Code, relating to taxation.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 364, as amended, Yee. ~~Sales and use taxes; income~~ *Income* taxes: business tax ~~incentives; credits~~; reporting information and penalty.

The ~~Sales and Use Tax Law~~, the Personal Income Tax Law, and the Corporation Tax Law authorize various credits, ~~deductions, exclusions, exemptions, and other tax benefits~~ with respect to the taxes imposed by those laws.

This bill would, with respect to any ~~business tax incentive or~~ business tax credit, as defined, enacted after the effective date of this bill, require a qualified taxpayer, as defined, that ~~benefits from a business tax incentive or~~ *claims a* business tax credit and that has a specified net decrease in its employees *in this state* to pay a penalty, as specified.

This bill would also require a qualified taxpayer ~~doing business in California that claims a business tax incentive~~ to submit to the State Board of Equalization ~~annually on a return or~~ to the Franchise Tax Board on the original return specified information, including the number of annual full-time equivalent employees employed by the qualified taxpayer in the state in the current and previous year, *as provided*. The bill would impose a penalty if that information is not provided.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. (a) The Legislature finds and declares the  
2 following:

3 (1) The nation's economy began to recover in 2010, but  
4 California still has the highest unemployment rate in the country.

5 (2) The creation of quality jobs, in key expanding and emerging  
6 industries, is critical to maintain California's status as a center of  
7 productivity, innovation, and growth.

8 (b) It is the intent of the Legislature to do all of the following:

9 (1) Encourage economic recovery and a deep and lasting  
10 rebound by increasing the number of quality jobs in this state.

11 (2) Encourage the state to invest in ensuring high-quality  
12 employment through transparency and accountability at all levels  
13 of business, in order to promote economic recovery and job  
14 creation.

15 (3) Provide tax ~~incentives, benefits, deductions, and credits~~ only  
16 to businesses that share the vision and commitment of a transparent,  
17 highly functioning, high-employment state.

18 ~~SEC. 2. Section 6372 is added to the Revenue and Taxation~~  
19 ~~Code, to read:~~

20 ~~6372. (a) Notwithstanding any other law, for calendar years~~  
21 ~~beginning on or after January 1, 2012, a qualified taxpayer that~~  
22 ~~benefits from a business tax incentive shall annually include on a~~  
23 ~~timely filed original return, in the form and manner as required by~~  
24 ~~the forms and instructions prescribed by the board, the number of~~  
25 ~~annual full-time equivalent employees employed by the qualified~~  
26 ~~taxpayer in the state for the current calendar year and the preceding~~  
27 ~~calendar year.~~

28 (b) ~~For purposes of this section:~~

1 (1) ~~“Annual full-time equivalent” means either of the following:~~

2 (A) ~~In the case of an employee paid hourly qualified wages;~~  
3 ~~“annual full-time equivalent” means the total number of hours~~  
4 ~~worked for the qualified taxpayer by an employee (not to exceed~~  
5 ~~1,820 hours per employee) divided by 1,820.~~

6 (B) ~~In the case of a salaried employee, “annual full-time~~  
7 ~~equivalent” means the total number of weeks worked for the~~  
8 ~~qualified taxpayer by an employee divided by 52.~~

9 (2) ~~“Business tax incentive” means an exemption or exclusion~~  
10 ~~from the taxes imposed by this part that is based on qualified wages~~  
11 ~~or the number of employees employed, by an act that takes effect~~  
12 ~~after the effective date of the act adding this section.~~

13 (3) (A) ~~“Qualified taxpayer” means a person that is a~~  
14 ~~manufacturer or a person that engages in research and development~~  
15 ~~activities in this state, and that pays qualified wages to more than~~  
16 ~~100 annual full-time equivalent employees in this state.~~

17 (B) ~~For the purpose of determining whether a person is a~~  
18 ~~qualified taxpayer, all employees of the trades or businesses that~~  
19 ~~are treated as related under Section 267, 318, or 707 of the Internal~~  
20 ~~Revenue Code shall be treated as employed by a single person.~~

21 (4) ~~“Qualified wages” means wages subject to Division 6~~  
22 ~~(commencing with Section 13000) of the Unemployment Insurance~~  
23 ~~Code.~~

24 (e) ~~Notwithstanding any other law, if a qualified taxpayer that~~  
25 ~~benefits from a business tax incentive has a net decrease in the~~  
26 ~~number of annual full-time equivalent employees in this state in~~  
27 ~~a calendar year that is equal to or greater than 10 percent of the~~  
28 ~~total annual full-time equivalent employees of the qualified~~  
29 ~~taxpayer in this state in the preceding calendar year, the qualified~~  
30 ~~taxpayer shall be subject to a penalty in the amount specified in~~  
31 ~~subdivision (d).~~

32 (d) ~~The penalty imposed under this section shall be computed~~  
33 ~~as follows:~~

34 (1) ~~Ninety percent of the annual full-time equivalents, including~~  
35 ~~any fractional portion thereof, for the prior calendar year, less~~

36 (2) ~~The annual full-time equivalents, including any fractional~~  
37 ~~portion thereof, for the current calendar year, multiplied by~~

38 (3) ~~Five thousand dollars (\$5,000) per annual full-time~~  
39 ~~equivalent, including any fractional portion thereof, as computed~~  
40 ~~under paragraphs (1) and (2).~~

~~(4) (A) For purposes of paragraphs (1) and (2), the employees of any trade or business acquired by the qualified taxpayer during the current calendar year shall be aggregated with the qualified taxpayer's existing employees.~~

~~(B) The provisions of subdivision (f) of Section 17276.20, except for paragraph (7) thereof, and subdivision (g) of Section 24416.20, except for paragraph (7) thereof, shall apply in determining whether the acquisition of a trade or business during the calendar year is required to be included in the calculation under this subdivision.~~

~~(5) If the amount computed under paragraph (2) exceeds the amount computed under paragraph (1), the penalty shall be zero.~~

~~(6) The amount of the penalty shall not exceed an amount equal to the amount of business tax incentives that reduced the tax of the qualified taxpayer on the qualified taxpayer's tax returns for the three preceding years.~~

~~(e) A qualified taxpayer that fails to timely provide the information required by subdivision (a) shall pay a penalty of five thousand dollars (\$5,000) for each failure, unless that failure is due to reasonable cause and not due to willful neglect. The penalty imposed pursuant to this subdivision shall be in addition to any penalty imposed under subdivision (c).~~

~~(f) (1) The board may prescribe rules, guidelines, or procedures necessary or appropriate to carry out the purposes of this section.~~

~~(2) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to any standard, criterion, procedure, determination, rule, notice, or guideline established or issued by the State Board of Equalization pursuant to this section.~~

~~(3) This section shall not limit the authority of the board to audit the information provided by the taxpayer pursuant to subdivision (a).~~

**SEC. 3.**

*SEC. 2.* Section 19137 is added to the Revenue and Taxation Code, to read:

19137. (a) (1) Notwithstanding any other law, for taxable years beginning on or after January 1, 2012, a qualified taxpayer doing business in this state that claims any business tax credit shall annually include on a timely filed original return, in the form and manner as required by the forms and instruction prescribed by the

1 Franchise Tax Board, the number of annual full-time equivalent  
2 employees employed by the qualified taxpayer in the state for the  
3 current taxable year and the preceding taxable year.

4 (2) *For purposes of this subdivision:*

5 (A) *The employees of any trade or business acquired by the*  
6 *qualified taxpayer during the current taxable year shall be*  
7 *aggregated with the qualified taxpayer's existing employees for*  
8 *the current and prior year reporting purposes.*

9 (B) *The employees of any trade or business that is disposed of*  
10 *or otherwise is no longer a related entity under the rules of this*  
11 *section during the current taxable year shall be excluded from the*  
12 *qualified taxpayer's existing employees for the current and prior*  
13 *year reporting purposes.*

14 (b) For purposes of this section:

15 (1) "Annual full-time equivalent" means either of the following:

16 (A) In the case of an employee paid hourly qualified wages,  
17 "annual full-time equivalent" means the total number of hours  
18 worked for the qualified taxpayer by an employee (not to exceed  
19 1,820 hours per employee) divided by 1,820.

20 (B) In the case of a salaried employee, "annual full-time  
21 equivalent" means the total number of weeks worked for the  
22 qualified taxpayer by an employee divided by 52.

23 (C) *For purposes of this paragraph, if either of the taxable years*  
24 *being reported under subdivision (a) is a period of less than 12*  
25 *months, the computation of "annual full-time equivalents" as*  
26 *prescribed in subparagraphs (A) and (B) shall be annualized by*  
27 *adjusting the numbers of hours or weeks, respectively, in the*  
28 *formula to equal the length of the period being reported, so that*  
29 *each annual full-time equivalent equals a 12-month equivalent.*

30 (2) "Business tax credit" means a credit that is based on  
31 *employee compensation that includes* qualified wages or the  
32 number of employees employed against the "net tax," as defined  
33 in Section 17039, or against the "tax," as defined in Section 23036,  
34 *added by an act that takes effect after the effective date of the act*  
35 *adding this section.*

36 (3) (A) "Qualified taxpayer" means a person that is engaged  
37 in or carrying on a trade, business, profession, vocation, calling,  
38 or commercial activity, in the state, and that pays qualifying wages  
39 to more than 100 annual full-time equivalent employees in this  
40 state.

(B) For the purpose of determining whether a person is a qualified taxpayer, all employees of the trades or businesses that are treated as related under Section 267, 318, or 707 of the Internal Revenue Code shall be treated as employed by a single person.

(4) “Qualified wages” means wages subject to Division 6 (commencing with Section 13000) of the Unemployment Insurance Code.

(c) Notwithstanding any other law, if a qualified taxpayer that claims a business tax credit against the “net tax,” as defined in Section 17039, or against the “tax,” as defined in Section 23036, has a net decrease in the number of annual full-time equivalent employees in this state in a taxable year that is equal to or greater than 10 percent of the total annual full-time equivalent employees of the qualified taxpayer in this state in the prior taxable year, the qualified taxpayer shall be subject to a penalty in the amount specified in subdivision (d).

(d) The penalty imposed under this section shall be computed as follows:

(1) Ninety percent of the annual full-time equivalents, including any fractional portion thereof, for the prior ~~calendar~~ taxable year, less

(2) The annual full-time equivalents, including any fractional portion thereof, for the current ~~calendar~~ taxable year, multiplied by

(3) Five thousand dollars (\$5,000) per annual full-time equivalent, including any fractional portion thereof, as computed under paragraphs (1) and (2).

~~(4) (A) For purposes of paragraphs (1) and (2), the employees of any trade or business acquired by the qualified taxpayer during the current calendar year shall be aggregated with the qualified taxpayer’s existing employees.~~

~~(B) The provisions of subdivision (f) of Section 17276.20, except for paragraph (7) thereof, and subdivision (g) of Section 24416.20, except for paragraph (7) thereof, shall apply in determining whether the acquisition of a trade or business during the calendar year is required to be included in the calculation under this subdivision.~~

*(4) For purposes of this subdivision:*

1 (A) The employees of any trade or business acquired by the  
2 qualified taxpayer during the current taxable year shall be  
3 aggregated with the qualified taxpayer's existing employees.

4 (B) The employees of any trade or business that is disposed of  
5 or otherwise is no longer a related entity during the current taxable  
6 year shall be excluded from the qualified taxpayer's existing  
7 employees.

8 (5) If the amount computed under paragraph (2) exceeds the  
9 amount computed under paragraph (1), the penalty shall be zero.

10 (6) (A) The amount of the penalty shall not exceed an amount  
11 equal to the amount of business tax credits that reduced the "net  
12 tax," as defined in Section 17039, or the "tax," as defined in  
13 Section 23036, of the qualified taxpayer, as reflected on the  
14 qualified taxpayer's income or franchise tax returns for the three  
15 preceding taxable years.

16 (B) For purposes of this section, any business tax credit that is  
17 sold, assigned, or otherwise transferred under the provisions of  
18 Part 10 (commencing with Section 17001), this part, or Part 11  
19 (commencing with Section 23001) to another taxpayer shall be  
20 treated as reducing the "net tax," as defined in Section 17039, or  
21 the "tax," as defined in Section 23036, of the qualified taxpayer  
22 for the taxable year for which the assignment, sale, or transfer  
23 was made.

24 (e) A qualified taxpayer that fails to provide the information  
25 required by subdivision (a) shall pay a penalty of five thousand  
26 dollars (\$5,000) for each failure, unless that failure is due to  
27 reasonable cause and not due to willful neglect. The penalty  
28 imposed pursuant to this subdivision shall be in addition to any  
29 penalty imposed under subdivision (c).

30 ~~(f) (1) If any business tax credit is allowed to be sold, assigned,~~  
31 ~~or otherwise transferred under the provisions of this part to another~~  
32 ~~taxpayer, any sale, assignment, or other transfer shall only be valid~~  
33 ~~if the seller or assignor expressly agrees to provide, and continues~~  
34 ~~to provide, to the buyer or assignee and the Franchise Tax Board,~~  
35 ~~in the form and manner specified by the Franchise Tax Board, the~~  
36 ~~information required by subdivision (a) in order to determine~~  
37 ~~whether a penalty should be imposed as calculated in subdivision~~  
38 ~~(d) with respect to the seller or assignor.~~

1     ~~(2) If a penalty is imposed pursuant to subdivision (c), the buyer~~  
2     ~~or assignee shall be required to include in its net income the amount~~  
3     ~~of the penalty.~~

4     ~~(3) This subdivision shall apply to any business tax credit that~~  
5     ~~is sold, assigned, or otherwise transferred under the provisions of~~  
6     ~~this part, notwithstanding any other provision of this part to the~~  
7     ~~contrary.~~

8     ~~(4) Notwithstanding any other law, if a seller or assignor fails~~  
9     ~~to satisfy the reporting requirements of this subdivision, then a~~  
10    ~~notice of proposed deficiency assessment attributable to the~~  
11    ~~business tax credit with respect to which the reporting requirements~~  
12    ~~were not satisfied may be mailed to the buyer or assignee within~~  
13    ~~four years from the date on which the reporting requirements are~~  
14    ~~satisfied by the seller or assignor.~~

15    ~~(g)~~

16    ~~(f) (1) The Franchise Tax Board may prescribe rules, guidelines,~~  
17    ~~or procedures necessary or appropriate to carry out the purposes~~  
18    ~~of this section.~~

19    ~~(2) Chapter 3.5 (commencing with Section 11340) of Part 1 of~~  
20    ~~Division 3 of Title 2 of the Government Code does not apply to~~  
21    ~~any standard, criterion, procedure, determination, rule, notice, or~~  
22    ~~guideline established or issued by the Franchise Tax Board~~  
23    ~~pursuant to this section.~~

24    ~~(3) This section shall not limit the authority of the Franchise~~  
25    ~~Tax Board to audit the information provided by the taxpayer~~  
26    ~~pursuant to subdivision (a).~~